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No. 07-1075

IN THE

Supreme Court of the United States

BELINDA DUPUY, *et al.*,

Petitioners,

v.

ERWIN MCEWEN, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE THE CHICAGO COALITION FOR THE HOMELESS; CHICAGO LEGAL ADVOCACY FOR INCARCERATED MOTHERS; COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.; EQUIP FOR EQUALITY; THE SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, HEALTH & DISABILITY ADVOCATES; THE BATTERED WOMEN'S RESOURCE CENTER; AND THE NEW YORK LEGAL ASSISTANCE GROUP IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are non-profit organizations serving low income families, families with members who have disabilities, and families with members who are suffering other disadvantages such as domestic abuse. Amici include the Chicago Coalition for the Homeless, the Chicago Legal Advocacy for Incarcerated Mothers ("CLAIM"), Council of Parent Attorneys and Advocates, Inc. ("COPAA"), Equip for Equality, the Sargent Shriver National Center on Poverty Law, Health & Disability Advocates, and the Battered Women's Resource Center, and the New York Legal Assistance Group.

SUMMARY OF ARGUMENT

The Seventh Circuit has established a new and incorrect standard for evaluating voluntariness in *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006). The Seventh Circuit held an agreement to relinquish parental rights is only involuntary if the State makes a misrepresentation to induce the agreement. *Id.* at 763. This misrepresentation standard ignores and contradicts substantial Supreme Court precedent holding voluntariness must be evaluated using a totality of circumstances test. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). It also directly conflicts with a decision by the Third Circuit, which held on essentially

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and each has been given at least 10 days notice of amici's intention to file.

the same facts, that a threat to remove a child if the parent did not agree to leave the house was coercive and not voluntary, without regard to whether there was a misrepresentation. *See Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997). The Seventh Circuit's standard leads to illogical results: the threat to take a child out of the home immediately is coercive if false, but is not coercive if true, even though the coercive effect of both statements is identical. Because the Seventh Circuit holds parents' due process rights are not implicated by an agreement to leave their house voluntarily, its unduly narrow and incorrect interpretation of voluntariness results in parents being forced to leave their homes based on mere suspicion of abuse, as in this case, or without any evidence of abuse whatsoever.

The damage done by the violation of a due process right affects all segments of society. Unnecessary safety plans which abruptly break apart families, harm people from all walks of life. Poor and disadvantaged families, however, carry a greater burden in trying to remedy this damage. These families lack resources at the initiation of the safety plan (access to counsel for advice), during the safety plan (access to alternative living arrangements and transportation), and after the safety plans (access to psychological, social work, or other professionals to help the child ameliorate the effects of the trauma). Amici raise concerns with this Court about poor, disabled, and otherwise disadvantaged families because these are the families Amici serve. Amici have insight into unintended consequences of this state practice, which illustrates why this case is of such importance that this Court must

accept it for review to correct the Seventh Circuit's improper narrowing of the voluntariness standard.

I. THE SEVENTH CIRCUIT ABANDONS 40 YEARS OF SUPREME COURT PRECEDENT, REDUCING THE STANDARD FOR VOLUNTARINESS TO NOTHING MORE THAN THE ABSENCE OF A MISREPRESENTATION.

In *Dupuy*, the Seventh Circuit held the State's threat to immediately remove a child is not coercive and does not render a parent's consent to a safety plan relinquishing parental rights involuntary, unless the State's threat is false. 465 F.3d at 763. The Seventh Circuit's focus on a single criterion—that is, coercion only exists where there is a misrepresentation—is unprecedented. Indeed, this Court has repeatedly held that voluntary consent and coercion are established by examining the totality of circumstances.

A. The Seventh Circuit's holding directly contradicts the totality of circumstances test established by the Supreme Court.

The totality of circumstances test was carefully crafted by the Supreme Court in *Brady v. United States*, 397 U.S. 742, 749 (1970) (voluntariness to an agreement "can be determined only by considering all of the relevant circumstances surrounding it"), and has been cautiously protected by this Court ever since. *See Schneckloth*, 412 U.S. 218; *see also United States v. Drayton*, 536 U.S. 194, 207 (2002); *Withrow v. Williams*, 507 U.S. 680, 689 (1993); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Haynes v. Washington*, 373 U.S. 503, 520–21 (1963). To

determine if consent to a governmental action was voluntary or coerced, a court must "assess[] the totality of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226. Voluntary consent is not determined by "the presence or absence of a single controlling criterion." *Id.* The rationale behind the totality of circumstances test is that the law will not condone using a person's apparent consent against him when his will has been over-borne and his consent is the product of coercion. *Id.*

The totality of circumstances test requires courts to carefully "scrutin[ize] all the surrounding circumstances." *Id.* Courts have considered, among other things, an individual's age, lack of education, intelligence, and access to counsel. *See, e.g., Payne v. Arkansas*, 356 U.S. 560 (1958); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Davis v. North Carolina*, 384 U.S. 737 (1966). Courts have also considered government coercion or threats. *Bumper v. North Carolina*, 391 U.S. 543, 548–50 (1968).

Under the totality of circumstances, the fact that the government threatens an individual may inform the court's decision about whether consent is voluntary, but it is not controlling. This is true regardless of whether the government has a legal right to make the threat or whether the threat is a misrepresentation. Indeed, this Court has affirmed the finding of voluntary consent in cases where the government's threat was an indisputable misrepresentation and has found consent to be involuntary in cases where the government's threat was true. *See, e.g., Frazier v. Cupp*, 394 U.S. 731, 737-39 (1969) (voluntariness affirmed *despite* indisputable misrepresentations made by police); *Bumper*, 391 U.S.

at 548–50 ("[w]hen a law enforcement officer claims authority to search a home under a warrant ... [t]he situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.").

The totality of circumstances test was initially developed in criminal cases involving Fourth and Fourteenth Amendment rights, but it has since been applied in the civil arena. *See, e.g., Regenold v. The Baby Fold, Inc.*, 369 N.E.2d 858, 866 (1977) (totality of circumstances test used to consent to adoption); *see also Cherita v. Gresbach*, 479 F. Supp. 2d 914, 920 (E.D. Wis. 2007); *Schwimmer v. Kaladjian*, 988 F. Supp. 631 (S.D.N.Y. 1997). Since *Schneckloth*, the Court of Appeals for nearly every circuit has adopted and applied the totality of circumstances test to evaluate the voluntariness of one's consent in both civil and criminal cases. *See, e.g., United States v. Lopez*, 437 F.3d 1059, 1063–67 (10th Cir. 2006) (confession involuntary under totality of circumstances); *Kaniff v. United States*, 351 F.3d 780, 785 (7th Cir. 2003) (plaintiff's consent to x-ray voluntary under totality of circumstances); *United States v. Soriano*, 361 F.3d 494, 501–03 (9th Cir. 2003) (under totality of circumstances, mother's consent to search voluntary despite officers' threats to take children if she did not consent); *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003) (confession involuntary under totality of circumstances when resulted from psychological coercion); *Hubbard v. Haley*, 317 F.3d 1245,1252–53 (10th Cir. 2003) (statement to police voluntary under totality of circumstances); *Ferguson v. City of Charleston*, 308 F.3d 380, 402–03 (4th Cir. 2002) (consent to take urine sample involuntary under totality